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In the Supreme Court of the United States

OCTOBER TERM, 1991

LOUISVILLE EDIBLE OIL PRODUCTS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

JACQUES B. GELIN
J. CAROL WILLIAMS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

1700

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the United States from initiating a criminal prosecution under the Clean Air Act against a corporation that has paid a civil penalty for the same conduct to a local government agency pursuant to state law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 926 F.2d 584. The memorandum opinion and order of the district court (Pet. App. 10a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1991. A petition for rehearing was denied on April 15, 1991. The petition for a writ of certiorari was filed on July 12, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, establishes a comprehensive national program for regulating air quality, and it authorizes federal criminal prosecutions for intentional violations of specific statutory provisions. In this case, petitioners Louisville Edible Oil Products, Inc. (LEOP), an affiliate of LEOP, and certain corporate officers were indicted in the United States District Court for the Western District of Kentucky on charges that they violated federal standards regulating asbestos emissions. Petioners moved to dismiss seven counts of the indictment, arguing that the Double Jeopardy Clause barred federal prosecution on those counts because LEOP had previously paid civil penalties to a local goverment agency, the Air Pollution Control District of Jefferson County (the Jefferson County Board), based on the same conduct. The district court rejected that contention, Pet. App. 10a-20a, and the court of appeals affirmed, *id.* at 1a-9a.

1. The Clean Air Act sets forth special provisions for the regulation of especially dangerous air pollutants. At the time relevant to the events here, Section 112 of the Clean Air Act required the Administrator of the Environmental Protection Agency (EPA) to publish a list of "hazardous air pollutants" and to prescribe emission standards or other requirements for those pollutants to protect the public health with an adequate margin of safety. 42 U.S.C. 7412(a), (b), and (e).[1]

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[1] Congress has since amended the Clean Air Act, effective November 15, 1990, and has comprehensively revised Section 112. See The Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 301, 711(b), 104 Stat. 2531-2574, 2684. The issues in this case are subject to the prior statutory provisions, and

The Administrator has listed asbestos as a hazardous air pollutant, 38 Fed. Reg. 8820 (1971), and has prescribed stringent limitations to protect the public from asbestos exposure, 40 C.F.R. 61.140-61.156. The Clean Air Act requires all persons to comply with the Administrator's limitations, CAA § 112(c), 42 U.S.C. 7412(c), and it provides various means for federal civil enforcement, CAA § 113 (a)(3), 42 U.S.C. 7413(a)(3). The Clean Air Act also authorizes the United States to bring a criminal prosecution for knowing violations. CAA § 113(c) (1)(C), 42 U.S.C. 7413(c)(1)(C).

2. The Clean Air Act gives the States the option of developing and submitting their own procedures to implement and enforce hazardous air pollutant emission standards within their borders. CAA § 112(d)(1), 42 U.S.C. 7412(d)(1). Section 112(d) provides that "[i]f the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards." 42 U.S.C. 7412 (d)(1). Section 112(d) further provides, however, that "[n]othing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section." 42 U.S.C. 7412 (d)(2).

The Commonwealth of Kentucky has adopted a state program for air pollution control that is consistent with the Clean Air Act. See Ky. Rev. Stat. Ann. §§ 77.005 *et seq.* (Michie/Bobbs-Merrill 1980 & Supp. 1990). In addition, the Kentucky Natural Resources and Environmental Protection Cabinet and the Jefferson County Board have promulgated regu-

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we shall limit our discussion (except where specifically noted) to the requirements of the prior law.

lations to control hazardous air pollutants, including asbestos. 401 Ky. Admin. Regs. 57:011, 63:042 (1990); Jefferson County Board Reg. 5.04, 5.13 (Jan. 1988). Those regulations adopt the EPA's standards and also impose additional requirements. See C.A. App. 204-211, 212-226.

The Administrator of the EPA has determined that Kentucky's laws and regulations provide an adequate and effective procedure for implementing and enforcing hazardous air pollutant emission standards. See 42 Fed. Reg. 64,735 (1977). He accordingly has delegated to Kentucky the EPA's responsibility under the Clean Air Act for regulating those pollutants. Under that delegation, Kentucky administers a hazardous air pollutant program under its own laws and regulations. The Administrator has reserved, however, his authority to enforce the federal standards as a matter of federal law. *Ibid.*

3. Petitioners are in the business of producing cooking, salad, and other edible oils. In 1986, they began relocating a processing facility within Jefferson County, Kentucky, and participated in the dismantlement of processing equipment that was insulated with asbestos. The Jefferson County Board determined that petitioner LEOP had failed to comply with the Board's asbestos regulations and issued a series of civil citations. Between 1986 and 1989, LEOP entered into three settlements with the Board and paid civil penalties in the aggregate amount of $174,000. Pet. App. 2a-3a, 10a-12a. See C.A. App. 136-166.

In 1990, a federal grand jury returned a nine-count indictment charging petitioners with criminal violations of the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Li-

ability Act (CERCLA), 42 U.S.C. 9601 *et seq.* Petitioners moved to dismiss seven of the nine counts. They argued that the Double Jeopardy Clause barred a federal prosecution based on their asbestos removal activities because the Jefferson County Board had assessed civil penalties against petitioner LEOP pursuant to the Board's local asbestos regulations, which had adopted the federal standards. Pet. App. 2a-3a, 10a-12a.

The district court denied the motion to dismiss. The court first concluded that only LEOP, which had paid the civil penalties, could raise a double jeopardy contention. Pet. App. 14a-15a. The court next concluded that the dual sovereignty doctrine, which provides that the federal and state governments may separately prosecute the same conduct, precluded LEOP's double jeopardy defense. *Id.* at 15a-17a. The court also rejected petitioners' contention that the Clean Air Act counts and the CERCLA counts constitute multiple prosecutions for the same offenses. *Id.* at 17a-20a.

Petitioners took an interlocutory appeal from the district court's order, and the court of appeals affirmed for essentially the same reasons given by the district court. Pet. App. 4a-9a. The court of appeals first agreed that a double jeopardy defense would be available—if at all—only to LEOP, which was the object of the local enforcement action. *Id.* at 4a-5a. The court then concluded that even if the Jefferson County Board's assessment of civil penalties amounted to a "prosecution" for double jeopardy purposes, cf. *United States* v. *Halper*, 490 U.S. 435 (1989), "federal prosecution of the same conduct subsequent to that punishment would not offend the double jeopardy clause because of the dual sover-

eignty possessed by the state and the federal government over this matter." Pet. App. 6a. The court observed that the Board's action here was based on its independent authority under state law and that the EPA had no statutory authority to control the Board's actions. *Id.* at 7a-8a. The court of appeals also rejected petitioners' renewed contention that the Clean Air Act counts and the CERCLA counts constitute multiple prosecutions for the same offenses. *Id.* at 8a-9a.

ARGUMENT

Petitioners contend that the Double Jeopardy Clause bars the United States from prosecuting them for criminal violations of the Clean Air Act. The court of appeals correctly rejected that contention, concluding that even if the federal and state enforcement actions amounted to two prosecutions for purposes of double jeopardy analysis, the well-established dual sovereignty doctrine would allow the federal and state governments to bring separate criminal proceedings for the same conduct. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals, nor does it otherwise warrant this Court's review.

1. Petitioners acknowledge that "the Double Jeopardy Clause does not generally apply to multiple prosecutions by separate sovereign governments" because, under the dual sovereignty doctrine, "a single act can be viewed as a transgression against the authority of more than one sovereign." Pet. 10. As this Court has explained:

> The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace

> and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences." *United States v. Lanza*, 260 U.S. 377, 382 (1922). As the Court explained in *Moore v. Illinois*, 14 How. 13, 19 (1852), "[a]n offence, in its legal signification, means the transgression of a law." Consequently, when the same act transgresses the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences; for each of which he is justly punishable." *Id.*, at 20.

Heath v. *Alabama*, 474 U.S. 82, 88 (1985).

In this case, petitioners are subject to separate federal and local enforcement actions because their conduct "transgresses the laws of two sovereigns." The federal indictment alleges that petitioners have violated the Clean Air Act by emitting a hazardous air pollutant in violation of federal emission standards. C.A. App. 6. See CAA § 112(c)(1)(B) and (e)(5), 42 U.S.C. 7412(c)(1)(B) and (e)(5); 40 C.F.R. 61.140-61.156. The Jefferson County Board's notices of violation, by contrast, allege violations of the Board's local regulations. See C.A. App. 136, 137, 141, 142, 143, 144, 151, 152, 153, 154, 155. Hence, the separate federal and local enforcement actions charge separate offenses that are separately punishable.

2. Petitioners nevertheless contend that the Double Jeopardy Clause should apply because the Board, "while ostensibly operating to enforce its own laws, was in reality operating as an agent of Congress and enforcing national emission standards on behalf of the EPA." Pet. 12. Petitioners' argument, however, is inconsistent with this Court's analysis in *Heath*. As the Court explained,

> the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of power.

474 U.S. at 88. Here, the United States and the Commonwealth of Kentucky draw their authority to enact their respective laws from distinct sources. See *id.* at 89. Congress enacted the Clean Air Act based on its constitutionally conferred powers, while Kentucky and (derivatively) the Board promulgated their asbestos regulations based on the Commonwealth's "inherent" sovereign power to enact laws governing public health and safety. *Ibid.* See, *e.g.*, *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 601 (1982) (recognizing the States' "sovereign power * * * to create and enforce a legal code, both civil and criminal"). The "reality" of the situation is that the United States and the Board have pursued their separate enforcement actions under separate exercises of sovereign authority. "Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922).

Petitioners further assert that the United States and the Board should be treated as one sovereign because "the penalties imposed by the state were based on federal law standards, incorporated into state law by means of congressional and EPA delegation of circumscribed enforcement authority." Pet. 13. That contention also is mistaken. First, the fact that Kentucky and the Jefferson County Board relied on the federal standards in formulating their stand-

ards is irrelevant to the issue at hand. The "crucial" factor is the source of the *authority* to promulgate the regulations—not the source of the regulatory language. *Heath*, 474 U.S. at 88. "This Court has plainly and repeatedly stated that two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns. See, *e.g.*, *United States* v. *Lanza*, 260 U.S. 377 (1922) (same conduct, indistinguishable statutes, same 'interests')." *Heath*, 474 U.S. at 92.

Second, Congress and the EPA did not "delegate" authority to Kentucky to promulgate local regulations. Kentucky, as a sovereign State, neither needed nor relied on congressional authorization to enact local law. It "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority." *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978). Thus, Kentucky acted, and authorized the Board to act, as an exercise of its "own sovereignty." *Ibid.* Congress may have given Kentucky an incentive to act by providing that if a State submits an adequate state mechanism for regulating hazardous air pollutants, it can *then* assume the EPA's duties within the State. CAA § 112(d), 42 U.S.C. 7412(d). Nevertheless, Kentucky remained free to decline that invitation. The State's decision to promulgate its own asbestos regulations that are enforceable as a matter of state law was purely an exercise of its own sovereign prerogatives. See *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987).[2]

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[2] Petitioners rely heavily (Pet. 11-12, 13) on a statement in *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), suggesting that a double jeopardy bar might arise if a State "in bringing its

3. Petitioners next argue that allowing separate enforcement of federal and state hazardous air pollutant standards will "substantially undermine" local government enforcement because "parties who risk duplicative federal enforcement will vigorously resist liability." Pet. 13-14. The dual sovereignty doctrine, however, does not turn on a "balancing of interests approach." *Heath*, 474 U.S. at 92. As this Court has explained, "the Federal Government has the right to decide that a state prosecution has not vindicated a violation of the 'peace and dignity' of the Federal Government." *Id.* at 93.

Furthermore, to the extent that petitioners are challenging the federal government's *exercise* of that right, their arguments are misdirected. The Clean Air Act expressly provides that the EPA's approval of a state program for hazardous air pollutant regulation does not diminish its authority to enforce "any applicable emission standard under this section."

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prosecution was merely a tool of the federal authorities" and "the state prosecution was a sham and a cover for a federal prosecution." *Id.* at 123-124. The court of appeals correctly rejected the contention that the Jefferson County Board was acting as a "tool" for federal authorities here. Pet. App. 7a-8a. Petitioners' suggestions (Pet. 12, 13) that the statement in *Bartkus* stands for a broader proposition are without support. Indeed, petitioners are unable to cite any case dismissing an indictment based on the remarks in *Bartkus*. The courts of appeals have uniformly rejected far narrower interpretations of the *Bartkus* dictum. See, *e.g.*, *United States* v. *Patterson*, 809 F.2d 244, 247-248 & n.2 (5th Cir. 1987); *United States* v. *Bernhardt*, 831 F.2d 181, 182-183 (9th Cir. 1987), cert. denied, 488 U.S. 954 (1988); *United States* v. *Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984); *United States* v. *Russotti*, 717 F.2d 27, 31 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); *United States* v. *Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

CAA § 112(d)(2), 42 U.S.C. 7412(d)(2). Thus, Congress has authorized dual federal and state enforcement and has, in effect, rejected petitioners' policy arguments. See, *e.g.*, *Lanza*, 260 U.S. at 385 ("If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision.").[3]

4. Finally, petitioners argue that the court of appeals' decision "is inconsistent with the related double jeopardy principles articulated by this Court in *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978)." Pet. 15. That contention does not warrant this Court's review. As an initial matter, petitioners did not make this argument, or even cite *Wheeler*, in their briefs to the court of appeals. It would be inappropriate, therefore, to consider the argument for the first time in this Court. In any event, the argument is without merit.

In *Wheeler*, the Court held that the United States and the Navajo Tribe could separately prosecute a Tribe member for related criminal offenses. The Court rejected the member's argument that the United States had extinguished the Tribe's sovereign identity, and it held that Indian tribes retain certain attributes of sovereignty, including "the sovereign power to punish tribal offenders." 435 U.S. at 323. Petitioners argue that here, by contrast, the Clean Air Act extinguishes the relevant aspects of Ken-

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[3] Petitioners suggest (Pet. 14-15) that if the EPA is dissatisfied with the State's enforcement activities, it could revoke its approval of the state program. The existence of that option, however, does not foreclose the EPA from exercising its express authority under Section 112(d)(2) to bring a separate enforcement action.

tucky's sovereignty. Petitioners assert that Section 116 of the Clean Air Act, 42 U.S.C. 7416, "specifically deprives" the States of their sovereign power to regulate hazardous air pollutants and that Section 112 then " 'regrants' that authority to the conditions." Pet. 17.

Petitioners' argument rests on a mistaken understanding of the Clean Air Act. Section 116, captioned "Retention of State authority," preserves a State's right to control air pollution, but provides that a State "may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under * * * [Section 112]." 42 U.S.C. 7416.[4] Thus, Section 116 does not result in "divestiture of state sovereignty over hazardous air pollutant regulation" (Pet. 17); instead, it requires only that state regulations be no less stringent than federal regulations. As this Court expressly recognized in *Wheeler*, such partial preemptions of state authority do not diminish a State's sovereignty as to laws that are not preempted:

> [W]hile the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Su-

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[4] Section 116 states, as relevant here:

> [N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions or air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under * * * [Section 112], such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such * * * section.

42 U.S.C. 7416.

> premacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power.

435 U.S. at 320. Accordingly, Kentucky's promulgation of the regulations at issue here remained an exercise of its own sovereign authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

JACQUES B. GELIN
J. CAROL WILLIAMS
Attorneys

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